

STATE OF MICHIGAN  
IN THE SUPREME COURT

ORIGINAL

DIANE BUKOWSKI, and  
the MICHIGAN CITIZEN,

Supreme Court No. 129409

Plaintiffs-Appellees,

Court of Appeals No. 256893

v

Wayne County Circuit Court  
No. 02-242574 CZ

CITY OF DETROIT,

Defendant-Appellant.

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**CITY OF DETROIT'S SUPPLEMENTAL BRIEF  
TO APPLICATION FOR LEAVE TO APPEAL**

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**FILED**

JAN 19 2007

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

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**CITY OF DETROIT'S SUPPLEMENTAL BRIEF TO  
APPLICATION FOR LEAVE TO APPEAL**

On December 8, 2006, this Court ordered that the parties may submit supplemental briefs on the City of Detroit's Application for Leave to Appeal. The City now submits its supplemental brief in accordance with the Court's order.

In order to assist the Court in arriving at a decision in this matter, the City attaches to its brief the November 6, 2000 affidavit of Benny N. Napoleon (Exhibit A), the December 6, 2001 affidavit of Benny N. Napoleon (Exhibit A)<sup>1</sup>, the February 5, 2003 affidavit of Walter Shoulders (Exhibit B)<sup>2</sup>, and the January 31, 2003 affidavit of Jerry Oliver (Exhibit C)<sup>3</sup>. These affidavits were discussed in the City's Application for Leave to Appeal, and the affidavits describe the purpose of the Shoulders' Report, and the circumstances surrounding its preparation. The City did not attach the affidavits to the application for leave to appeal, but does so now in order to assist the Court.

**I.     The Plain Language of the Frank Communications Exemption Dictates that the Shoulder's Report Is a Frank Communication Subject to the Exemption Because the Report was Prepared Preliminary to Final Agency Action.**

This application for leave to appeal specifically concerns the frank communications exemption within Michigan's Freedom of Information Act. In relevant part, MCL 15.243(1)(m) provides as follows:

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<sup>1</sup>The Napoleon affidavits were attached in Exhibit A to Defendant's June 30, 2003 Motion for Summary Disposition in the circuit court.

<sup>2</sup>The Shoulder's affidavit was attached in A to Defendant's Motion for Summary Disposition in the circuit court.

<sup>3</sup>The Oliver affidavit was attached in Exhibit A to Defendant's Motion for Summary Disposition in the circuit court.

(1) A public body may exempt from disclosure as a public record under this act:

\* \* \*

(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials *and are preliminary to a final agency determination* of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

(Emphasis added).

When a court engages in statutory construction, the primary goal is to give effect to the intent of the Legislature. Sanders v Delton Kellogg Schools, 453 Mich 483, 487; 556 NW2d 467 (1996). If the language of a statute is plain and unambiguous, the courts are to effectuate the plain meaning found in the words of the statute, and there should be no further need for construction or interpretation. Hesse v Ashland Oil Co, 466 Mich 21, 30; 642 NW2d 330 (2002). It is not the function of the courts to rewrite statutes, or to legislate under the guise of judicial construction. Id. at 31. Courts will only supply missing language in a statute to avoid an absurd result. Empire Iron Mining v Orhanen, 455 Mich 410, 424; 565 NW2d 844 (1997).

In this case, the key inquiry turns on the phrase "preliminary to a final agency determination", and whether the phrase modifies the timing of a document's creation, or the timing of the FOIA request. In fact, the only reasonable construction is that the term "preliminary" modifies "communications and notes", such that communications and notes which **are** preliminary to final agency action are subject to the frank communication exemption.

For the Court to elect to follow Plaintiff's construction, the Court would have to add a phrase to the statute as written, and would have to engage in legislating contrary to well established rules

of statutory construction. Plaintiff would like this Court to read the phrase "preliminary" as modifying the date of the FOIA request. However, there is no language in the exemption to suggest that the term "preliminary" refers to the date or timing of the FOIA request. For the Court to read the statute as Plaintiff suggests, the Court would have to add language to the statute to the effect that the exemption is lifted on all materials, regardless of when they were created, once there is a final agency determination. If the Legislature had intended such a result, it would have included the language to provide that the timing of the FOIA request is pivotal to lifting the exemption. Moreover, for the reasons stated in the City's Application for Leave to Appeal, such a construction would not only usurp the role of the Legislature in enacting FOIA, but would undermine the purpose behind the exemption which is to encourage frank communications between public officials.

Further, the City's interpretation of the frank communications exemption is supported by this Court's recent decision in Herald Company, Inc. v Eastern Michigan University Board of Regents, 475 Mich 463; 719 NW2d 19 (2006). In Herald Company, Inc., this Court discussed the elements of a frank communication:

Therefore, a document is a "frank communication" if the trial court finds that it (1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) *is preliminary to a final agency determination of policy or action.*

475 Mich at 475. (Emphasis added).

Contrary to plaintiff's urged interpretation, this test does not say anything about whether the FOIA request is made before or after the final agency decision. The test is whether the document is preliminary to a final agency determination.

It is also clear from this Court's discussion of the policy behind the frank communication exemption that the policy is best served by the City's interpretation of the exemption. In discussing the Legislature's purpose in drafting the exemption, this Court stated:

the Legislature decided that the public has an interest in *encouraging* frank communication so that public officials' *ongoing* and *future* willingness to communicate frankly in the course of reaching a final agency determination is an essential component in the balancing test.

475 Mich 474. (Emphasis in original). Later, in responding to the plaintiff's argument that because the letter at issue contained criticism of a public official, that the document must be disclosed to assure good government, this Court stated that "[w]ere we to adopt such a rule, we would eviscerate the frank communication exemption. We doubt that officials within a public body would offer *candid, written* feedback, or that they would do so for very long, if that feedback would invariably find its way into the public sphere." 475 Mich at 478. (Emphasis in original).

This Court's decision in Herald Company, Inc. made clear that the policy of encouraging frank communication between public officials does not just apply to one individual who may have written a document critical of another public official, but to the entire public institution at issue. The policy is to protect and encourage future frank communications between public officials, and it is this policy which would be undermined were there to be disclosure of frank communications after the final agency action at issue. There should be no doubt that this policy, which was discussed at length in the Herald Company, Inc. decision, supports the City's position that a frank communication created before a final agency determination is to remain exempt, even after the final agency determination takes place.

## **II. The Federal Freedom of Information Act Similarly Exempts Predecisional Communications From Disclosure.**

Under the Federal Freedom of Information Act, 5 USC §552, governmental agencies may exempt from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . " The same policy rationale which underlies the Michigan frank communication exemption underlies the Federal exemption, and the federal exemption has been consistently interpreted to exempt predecisional communications from disclosure.

Exemption 5 of the Federal Freedom of Information Act incorporates the common law deliberative process privilege. 37A Am Jur 2d, *Freedom of Information Act*, §189. The purpose underlying the privilege is to protect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions are formulated. Id.

Further, under Exemption 5 to the Federal Freedom of Information Act, the exemption applies to predecisional communications. That is, it applies to all papers which reflect the agency's group thinking in the process leading up final policy or action. NLRB v Sears, Roebuck & Co, 421 US 132, 151, 44 L Ed 2d 29, 95 S Ct 1504 (1975). See also EPA v Mink, 410 US 73, 93 S Ct 827, 35 L Ed 2d 119 (1973); and 168 ALR Fed 143.

The NLRB decision applies to exempt predecisional communications from disclosure, and does not state that the exemption is lifted once the final agency action takes place. The reason the Court does not provide for lifting the exemption after a final agency action is that such a disclosure would undermine the stated purpose behind this federal exemption - - to encourage the free exchange of opinions and ideas leading up to a final decision. The federal exemption and the authorities




discussing the federal exemption lend further support to the City's position, and further highlight that Plaintiff is urging an interpretation of the FOIA which is not supported by the language of the statute, and not supported by the policy underlying the frank communication exemption.

**CONCLUSION**

For the foregoing reasons, the City of Detroit respectfully requests that this Court reverse the Court of Appeals decision that the frank communication exemption is lifted once final agency action takes place, as unsupported by the language of the exemption, and unsupported by the policy underlying the exemption. In the alternative, the City of Detroit respectfully requests that this Court grant the City's application for leave to appeal.

Respectfully submitted,

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DATE: January 18, 2007